Supreme Court, U.S.
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No. 79-937

In the Supreme Court of the United States

OCTOBER TERM, 1979

JULIUS VARGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the evidence was insufficient to support his mail fraud convictions and that a summary chart was improperly admitted into evidence.

1. After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, and two counts of embezzling manpower funds, in violation of 18 U.S.C. 665. He was sentenced to five years' imprisonment on each of the mail fraud counts and two years' imprisonment on each of the embezzlement counts, the sentences to run concurrently. The court of appeals affirmed by judgment order (Pet. App. A).

The evidence showed that as City Clerk of Jeannette, Pennsylvania, petitioner was responsible for collecting certain money owed to the city. Relying on this authority, he requested the Westmoreland Casualty Company to mail workmen's compensation checks directly to him, rather than to the injured employees as had been the prior practice (Tr. 60-62).[1] The checks were sent to him as requested (Tr. 73-78). Some employees endorsed the checks over to the city at petitioner's request (Tr. 912-919, 961-965); the endorsements on others were forged (Tr. 803-810, 944-951). Instead of reporting his receipt of the checks to the City Treasurer as he was required to do (Tr. 647-652), petitioner reported them as though they were garbage service payments, which he was also authorized to collect (Tr. 208). He then appropriated cash from the garbage services receipts in an amount equal to the incorrectly reported checks (Tr. 1130-1177). When members of his office became suspicious that money was being diverted, they began initialling the checks that they processed, and endorsing them with a stamp that they locked up after working hours.[2] Petitioner thereupon forged the initials of his clerks and used a counterfeit stamp on the diverted checks (Tr. 228-265; Gov't Exh. 183). An audit conducted by the FBI showed that from January 1969 to November 1974, 102 insurance, CETA, and snow removal checks that had been mailed to petitioner had not been correctly reported. The checks totalled more than $31,000 (Gov't Exh. 183).

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[1]Although the checks were made payable to the employees, the city was entitled to the money because the employees were paid their full salaries during their absences (Tr. 445-446).

[2]Although the office staff received payments made in person, petitioner himself received and distributed the mail (Tr. 153-158, 210-211, 394, 561-570).

2. Petitioner contends (Pet. 5-6) that there was not a sufficiently close nexus between the mailings and his fraudulent scheme to bring his conduct within the reach of the federal mail fraud statute, 18 U.S.C. 1341.[3] The evidence refutes this claim. Petitioner's receipt of the checks through the mail clearly facilitated the operation of his scheme to divert them, because it permitted him to obtain possession of the checks before they entered the normal office routine. Thus, this is not a case in which the mailings played no significant part in the scheme to defraud, as in *United States* v. *Maze*, 414 U.S. 395 (1974), upon which petitioner relies. Rather, as in *Pereira* v. *United States*, 347 U.S. 1, 8 (1954), the mailings were "incident to an essential part of the scheme."

Petitioner asserts that the mailings did not fall within Section 1341's proscriptions because they were of a routine business nature. But the evidence showed that petitioner persuaded the insurer to alter its business routine by mailing the checks to him, rather than directly to the injured employee. In any event, a routine business mailing may be the basis for a mail fraud prosecution where, as here, the mailing is integral to the fraudulent

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[3]18 U.S.C. 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

scheme. See *Pereira* v. *United States*, *supra*; *United States* v. *Brown*, 583 F. 2d 659, 667-668 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979); *United States* v. *Foshee*, 569 F. 2d 401 (5th Cir. 1978).

3. Petitioner also contends (Pet. 6-7) that a summary chart (Gov't Exh. 183) prepared by an FBI accountant was improperly admitted into evidence. The chart consisted of a list of the checks that petitioner substituted for the cash he misappropriated, including their amount; their dates of issue and presentment; the name of the payor and payee; whether petitioner had reported the check; whether the payee's endorsement, the endorsement stamp, and the assistant clerk's initials were genuine; whether the amount of the check corresponded to amounts on other exhibits introduced; and whether the check contained fingerprints of some known individual (see Tr. 1068-1083). Petitioner concedes (Pet. 6) that the chart was admissible under Fed. R. Evid. 1006, insofar as it listed each check and represented its physical content.[4] He objects, however, to the chart's representation of testimony already before the jury.

The admissibility of a summary chart is within the sound discretion of the trial court. *United States* v. *Goodwin*, 470 F. 2d 893, 898-899 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973); *United States* v. *Johnson*, 319 U.S. 503, 519-520 (1943). Here, the district court, after examining the chart and requiring certain changes in the characterization of the information summarized (Tr. 1054-1059), admitted it not as independent evidence, but to aid the jury in the difficult task of correlating each check with the testimony that related to it (Tr.

[4]Rule 1006 provides for the admissibility of summaries or charts of "voluminous writings, recordings, or photographs which cannot conveniently be examined in court * * *."

1053-1054). The jury was reminded that it was required to exercise its untrammeled judgment upon the worth of that testimony. Thus, the court instructed the jury when the chart was admitted that "[w]hether or not something is true or false * * * is a conclusion solely for the jury, and we ask that the exhibit and the testimony of the agent be confined to what facts he found with respect to these, and you will pay attention to any findings of fact and compare them to the documentary evidence and what you have heard and determine for yourselves whether or not these are established as fact" (Tr. 1065). Moreover, petitioner does not show that the chart distorted the testimony or otherwise prejudiced him in any way; the person who prepared the chart testified and was subjected to extensive cross-examination (Tr. 1076, 1216-1265, 1275-1329). Under these circumstances, the court did not abuse its discretion in admitting the chart. See *United States* v. *Johnson*, *supra*, 319 U.S. at 519; *Gordon* v. *United States*, 438 F. 2d 858, 876-877 (5th Cir.), cert. denied, 404 U.S. 828 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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